Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-483

EDWARD SAFFRON,

Petitioner,

v.

DEPARTMENT OF THE NAVY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September 26, 1977

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioners Edward Saffron respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on July 1, 1977.

OPINION BELOW

The opinions of the Court of Appeals and the District Court appear in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on July 1, 1977. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 27 USC §1254(1).

QUESTIONS PRESENTED

1. Whether a wrongfully terminated Government employee's claim for reinstatement, back pay, restoration of benefits, correction of personnel record and related relief is governed by the equitable doctrine of laches or by the statute of limitations set forth at 28 USC §2401(a).

(a) Whether the statute of limitations in 28 USC 2401 (a) applies by definition to equitable claims as is the rule in the Ninth Circuit or merely by analogy as is the rule in the District of Columbia Circuit.

(b) Whether a claim for back pay is legal or equitable in nature, where the lower court and the administrative agency have discretion as to the amount of pay to be awarded.

(c) Whether the doctrine of laches applies if a Government employee couples his claim for restoration of benefits, reinstatement, correction of personnel record and related relief with a claim for damages.

(d) Whether 28 USC §2401(a) applies to a wrongfully terminated Government employee's claim against individually named defendants.

2. Whether the district court erred in dismissing the complaint without making findings as to acquiescence and diligence by the plaintiff and prejudice to the defendant.

3. Whether legal claims shall be deemed to dominate equitable claims for purposes of the statute of limitations merely because legal relief is available partly to remedy the plaintiff where the plaintiff couples his prayer for job reinstatement with a prayer for damages.

STATUTORY PROVISIONS

United States Code, Title 28

§2401. Time for Commencing Actions against United States.

(a) Every civil action commenced against the United States shall be barred unless a complaint is filed within six years after the right of action first accrues.

§2501. Time for Filing Suit.

Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

36 Stat. 1087, 1093, ch. 231 (1911)

§24. The district courts shall have original jurisdiction as follows:

* * *

Fourteenth. Of all suits at law or in equity . . . to redress the deprivation . . . of any right, privilege or immunity secured by the Constitution of the United States.

* * *

Twentieth. . . . [O]f all claims . . . founded upon the

Constitution . . . or any law of Congress . . . *And* . . . *provided* . . . , That no suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued . . . .

United States Code, Title 5

§5596. Back pay due to unjustified personnel action.

An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found . . . by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or any part of the pay . . . of the employee –

(1) is entitled, upon correction of such personnel action, to receive for the period for which such personnel action was in effect an amount equal to all or any part of the pay . . . that the employee normally would have earned . . . .

United States Code, Title 42

§2000-e5(g). Injunctions - Affirmative action - Equitable relief. If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice . . . , the court may . . . order such affirmative action as may be appropriate which may include but is not limited to, reinstatement . . . with or without back pay.

STATEMENT OF THE CASE

Petitioner, an unlawfully terminated government

employee, seeks essentially equitable relief – restoration to federal employment, resumption of employee benefits, back pay, correction of permanently stigmatizing personnel records, a declaration that his termination was illegal, and related relief. Because he added to these equitable prayers a claim for damages, the District of Columbia circuit created a conflict in the circuits by ruling that his prayer for damages requires application of the statute of limitation, rather than the doctrine of laches, to all the petitioner's claims. The opinion acknowledges that petitioner could have overcome the defense of laches if equity rather than law governed his case, because petitioner has not slept on his rights.

Petitioner was a civilian employee of the Navy, and a union organizer. His union activities antagonized his supervisors. After he sustained a six-inch inoperable hernia on the job, his supervisor ordered him to duties which – according to a Public Health Service doctor – would further tear petitioner's abdominal wall. Petitioner followed the doctor's recommendation and refused to do the work, whereupon he was fired for insubordination. Petitioner's attorney failed to introduce the petitioner's doctor's report at petitioner's Civil Service Commission hearing, and the Civil Service Commission upheld the dismissal.

During the ensuing eight years, petitioner diligently tried to bring this case to court. He retained counsel to bring a Freedom of Information Act suit to obtain all the Government's evidence bearing on his case. When that case was concluded, having exhausted his savings on legal fees, petitioner filed a pro se suit which was dismissed for failure to state his claim concisely. The denial of his motion to amend the complaint was

summarily affirmed on appeal. He filed another pro se complaint in another jurisdiction, which the clerk of the court rejected. Petitioner contacted fourteen attorneys, various public interest groups, numerous public officials and members of Congress in an effort to win reinstatement and remove the permanent and continuing disability of his dismissal for "insubordination." In 1975, he finally found the undersigned counsel to take the case to court at a fee petitioner could afford.

If equity prevailed, the court would have aided petitioner in his lonely battle against the United States Government. Laches would not have barred him from a hearing because the petitioner has been diligent and non-acquiescent, and there has been no showing of prejudice to the Government should it now be required to justify its continuing classification of petitioner as an employee dismissed for insubordination. The District Court, without making any findings as to the elements of laches, dismissed the claim as time-barred. The Court of Appeals for the District of Columbia Circuit upheld the dismissal of the complaint, on the ground that petitioner's claims for reinstatement, correction of personnel records and damages were not governed by laches but by the six-year statute of limitations on claims against the government because added to petitioner's equitable prayers was a claim for damages.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW, APPLYING A FEDERAL STATUTE OF LIMITATION TO CURTAIL THE EQUITABLE POWERS OF THE FEDERAL COURTS, VIOLATES ARTICLE III AND THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND CONFLICTS WITH THE DECISIONS OF THE COURT OF CLAIMS AND OTHER FEDERAL COURTS THAT FEDERAL EMPLOYEES' CLAIMS ARE GOVERNED BY LACHES.

The equity powers of the federal courts, mandated by Article III, sec. 2 cl. 1 and the Fifth Amendment of the United States Constitution, may not be abrogated by Congress.[1] In *Holmberg v. Armbrecht*, 327 U.S. 392 (1946), the Court held:

> (S)tatutes of limitation are not controlling measures of equitable relief. Such statutes have been drawn upon by equity solely for the light they

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[1] Robinson v. Campbell, 3 Wheat. 223 (1818), Martin v. Hunter's Lessee, 1 Wheat. 304 (1816), 1 Crosskey, Politics and the Constitution in the History of the United States, 610-620 (1953), Hart, The Power of Congress to Limit the Jurisdiction of the Federal Courts, 66 Harv. L.Rev. 1362 (1953).

The genius of our legal system is due in substantial measure to the existence of equitable principles, which are not subject to modification by the legislature even if there were no Article III, sec. 2, cl. 1:

> Equity is a body of rules, existing by the side of the original civil law, founded on distinct principles and claiming to supercede the civil law, in virture of a superior sanctity inherent in those principles. Its claim to authority is grounded not on the prerogative of any external person or body, not even on that of the magistrate who enunciates it, but on the special nature of its principles. Those principles pretend to a paramount sacredness, entitling them at once to the recognition of the courts, even without the concurrence of princes or parliamentary assembly. Maine, Ancient Law, 27 (1817).

> may shed in determining . . . whether the plaintiff has inexcusably slept on his rights . . . This equitable doctrine is read into every federal statute of limitation.

Although the above passage would seem to govern cases like the one at bar, there has been some confusion in the federal courts in applying it to 28 USC §2401(a) and 2501(a), which limit claims against the federal government. In *Werner v. United States,* 188 F.2d 266 (9 Cir. 1951), the Ninth Circuit held, "The provisions of section 2401(a) apply to . . . an action at law precisely as they would to . . . an action at equity."[2] The Fifth Circuit, when confronted with a legal claim coupled with an equitable claim in *Screvens v. United States,* 207 F.2d 740 (5 Cir. 1953), did not interpret 28 USC §2401(a) as automatically cutting off the equitable claim but instead noted that the granting of the equitable claim (a prayer to set aside a condemnation order) would "avail plaintiffs nothing" because the statute of limitations had already run on the legal claim (to recover additional compensation for a condemnation).[3] *McCrocklin v. Fowler,* 285 F. Supp. 41 (E.D. Wisc. 1968) held that laches barred a 30 year old claim against the United States, without mentioning any automatic cut off of equitable claims by §2401(a). Judge McGowan, in his concurring opinion in this case, opted for the Ninth Circuit's automatic cut-off

[2] This holding was adopted in Reconstruction Finance Corp. v. Toulumne Gold D Corp., 137 F. Supp. 855 (N.D. Cal. 1955).

[3] In Childers v. United States, 442 F.2d 1299 (5 Cir. 1971), on the other hand, the court held that another federal statute of limitation on claims against the United States could not be extended by equitable considerations. 442 F.2d 1303.

approach. The majority opinion avoided the Ninth Circuit's "definitional" approach by ruling that because petitioner had prayed for damages,[4] his claim for reinstatement, correction of personnel records, back pay and related relief should be governed by 28 USC §2401(a).[5]

The first point which needs to be resolved by this Court, therefore, is whether the doctrine of *Holmberg v. Armbrecht, supra,* that statutes of limitations are not controlling measures of equitable relief, applies to 28 USC §2401(a). The second issue requiring resolution by the Court is whether laches rather than the statute of limitations governs the claims of illegally terminated federal employees. The ruling below that federal employees' claims are governed by the statute of limitations conflicts with a long line of federal cases,

[4] The court's holding is premised on the assumption that claims for back pay are legal rather than equitable, which violates the doctrine of Albermarle v. Moody, 422 U.S. 405 (1975), Curtis v. Loether, 415 U.S. 189 (1974), Mitchell v. DeMario Jewelry, 361 U.S. 288 (1960), and NLRB v. Jones & Laughlin Steel, 301 U.S. 1 (1937) that back pay awards are equitable in nature where administrative expertise or judicial discretion determines the amount of the back pay award. 5 USC §5596 provides:

> An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found . . . to have undergone an unjustified or unwarranted personnel action . . . is entitled upon correction of such personnel action, to receive for the period for which such personnel action was in effect an amount equal to all *or any part of the pay* . . . that the employee normally would have earned. (emphasis added)

[5] This doctrine is also followed in the Second Circuit. Swan v. Board of Higher Education, 319 F.2d 56 (2 Cir. 1963).

particularly in the Court of Claims, holding that government employees' claims for reinstatement and back pay are governed by laches.[6]

2. THE CIRCUITS DIFFER AS TO WHEN LEGAL CLAIMS DOMINATE EQUITABLE CLAIMS FOR PURPOSES OF STATUTES OF LIMITATIONS AND LACHES.

This case raises a serious jurisdictional and procedural issue in an area where federal courts should be uniform. If the petitioner lived in the Third Circuit, he would already have had his day in court. The Third Circuit has ruled that if equity is needed to make the plaintiff whole, laches applies. Churma v. United States Steel

[6]Government employees' claims for back pay are governed by the doctrine of laches, Brundage v. United States, 206 Ct. Cl. 823, 504 F.2d 1382, 1386 (1974), cert. denied, 421 U.S. 998; Grisham v. United States, 183 Ct. Cl. 657, 392 F.2d 980, cert. denied, 393 U.S. 843 (1968); Jackson v. United States, 179 Ct. Cl. 29, cert. denied, 389 U.S. 985 (1967).

The defense of laches is entrenched in the jurisprudence of claims for reinstatement as well. United States ex. rel Arant v. Lane, 249 U.S. 367, (1919); Corrington v. Webb, 375 F.2d 298 (9 Cir. 1967), cert. denied, 398 U.S. 930, Gersten v. United States, 176 Ct. Cl. 633, 364 F.2d 850 (1966), and James v. Ambrose, 367 F. Supp. 1321, 1327 (D.V.I. 1973).

The majority of the cases cited deal with claims which were held barred by laches even though they were brought within the six-year period. However, laches is laches, whether it occurs before or after the analogous statute of limitations has expired. Gardner v. Panama R. Co., 342 U.S. 29 (1951), Holmberg v. Armbrecht, supra, Hall v. Law, 102 U.S. 461 (1880), Sullivan v. Portland & K R Co., 94 U.S. 806 (1876), Stearns v. Page, 48 U.S. 819 (1849).

Corp., 514 F.2d 1252, 1256 (3 Cir. 1975); Gruca v. United States Steel Corp., 495 F.2d 1256, 58 (3 Cir. 1974). The District of Columbia Circuit here ruled that whether equity is needed to make the plaintiff is whole is irrelevant – what matters is whether legal relief is available partly to vindicate the right asserted. Slip. op., 11-12.

The notion that the availability of legal relief partly to vindicate the plaintiff negates the defense of laches is fundamentally unsound. Only equitable doctrines can limit the equitable powers of the federal courts. The purpose of equity is to rectify injustices that result from the rigid application of legal doctrines. The notion that laches should be inapplicable merely because legal relief could *partly* remedy the situation is a fundamental violation of equitable principles. Less drastic means are available for determining whether an equitable claim is genuine or merely a ruse to get around the statute of limitations.

3. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE RELATIONSHIP BETWEEN LACHES, STATUTES OF LIMITATIONS, AND THE CLAIMS OF ILLEGALLY DISCHARGED EMPLOYEES.

There are substantial numbers of people affected by the decision below. In 1975, federal civilian employment totalled over 2 million. *United States Civil Service Commission Annual Report, 22.* The number of appeals taken within the Civil Service Commission in 1975 alone was 10, 371. *Annual Report, supra,* 34. A large number of federal employees' claims are litigated in the

District of Columbia. With the District of Columbia Circuit holding that such claims when coupled with prayers for damages are legal in nature, and the Court of Claims holding that the claims are governed by laches, forum shopping and a substantial difference in outcome of cases are highly probable. This result is what Congress sought to avoid by mandating that federal employees receive equal treatment in the Court of Claims and the district courts. 28 USC 1346(d). Not only will the decision below lead to forum shopping, but it will force litigants to gamble on foregoing their claims for damages to protect their equitable claims.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the District of Columbia Circuit.

Respectfully submitted,

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September 26, 1977

CERTIFICATE OF SERVICE

Three copies of the foregoing Petition for Writ of Certiorari were mailed to U.S. Department of Justice, Counsel for Respondents, Washington, D.C. on September 26, 1977.

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Washington, D.C. 20008
Counsel for Petitioner

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1794

EDWARD SAFFRON, APPELLANT

v.

DEPARTMENT OF THE NAVY, *et al.*

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 75-0163)

Argued April 14, 1976

Decided July 1, 1977

Judgment entered this date

Betty J. Clark for appellant.

Mark H. Tuohey, III, Assistant United States Attorney, with whom *Earl J. Silbert*, United States Attorney, *John A. Terry*, *John R. Dugan*, Assistant United States Attorneys, and *James F. McMullin*, Assistant United States Attorney at the time the brief was filed, were on the brief, for appellee.

Before McGOWAN, ROBINSON and WILKEY, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* ROBINSON.

Opinion concurring separately filed by *Circuit Judge* McGOWAN.

ROBINSON, *Circuit Judge*: The pivotal question confronting us is whether the six-year limitation imposed generally by 28 U.S.C. § 2401(a)[1] on litigation brought against the United States is applicable to the suit of a discharged federal employee for restoration to his job as well as to his claim therein for damages. We hold that the effort in each respect was an action against the United States within the contemplation of that section and consequently is barred in full.

I

On November 26, 1965, the Department of the Navy terminated appellant's employment as a civilian aircraft engine mechanic.[2] Administrative remedies by which he challenged his dismissal were exhausted on April 26, 1966, when the Board of Appeals and Review of the Civil Service Commission upheld the Navy.[3] On February 4, 1975—more than eight years and nine months later—appel-

[1] Quoted in text *infra* at note 23.

[2] Having occupied the position since April 6, 1955, appellant sustained a job-related injury on September 16, 1964, while lifting a torque bar. He was later assigned to other duty, for which the Navy deemed him medically fit, but which he refused to perform on the ground that his health would be endangered.

[3] Appellant was represented throughout the administrative proceedings by union attorneys who, several weeks after completion of the administrative process, informed him that after thorough evaluation of his file they were "of the opinion that proceeding into court would certainly have no useful purpose or be beneficial to you." Appellant's Appendix (App. I) 20.

lant filed in the District Court for the District of Columbia the lawsuit in which this appeal is taken.[4] Appellant sought a judgment setting aside his removal from federal service, reinstating him in his job, and awarding damages, including backpay and other employment benefits.

Appellees, mainly the Department of the Navy,[5] moved to dismiss the suit on the ground that relief was barred by Section 2401(a) and the conventional doctrine of laches. The District Court granted the motion, concluding that monetary recovery was foreclosed by the statute and that job-restoration was precluded by undue prejudicial delay.[6] Appellant argues that during the lengthy interval between the final administrative decision and institution of suit, extensive efforts on his part to obtain remediation tolled the limitation period and negated the defense of laches.

That appellant actively engaged in other endeavors to rectify his situation seems to be conceded. He wrote many letters and made numerous visits to members of the business, governmental and political communities, complaining of his dismissal and soliciting assistance. He also contacted more than a dozen attorneys in efforts to maintain legal representation, often without success.[7] In November, 1967, he brought in the District Court for the District of Rhode Island a suit under the Freedom of Informa-

[4] *Saffron* v. *Department of the Navy*, Civ. No. 75-0163 (D.D.C.).

[5] Remaining appellees are the Secretary of the Navy, the Secretary of Labor, the Civil Service Commission and one of its members.

[6] *Saffron* v. *Department of the Navy, supra* note 4 (order of May 15, 1975).

[7] But see note 3 *supra* and notes 8, 15 *infra*.

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tion Act [8] for access to records pertaining to his discharge,[9] and eventually obtained an order that all available data be turned over to him.[10] Appellant states that subsequently he tendered a second complaint, *pro se*, to that court but that it was "rejected by the clerk, who suggested [that he] file the suit in" this circuit.[11]

On November 24, 1971, appellant applied *pro se* to the District Court for the District of Columbia for a writ of mandamus to the Secretary of Labor and others, but suffered a dismissal without prejudice.[12] On February 22, 1972, he asked leave to amend his complaint but was refused;[13] continuing *pro se*, he then opted for summary reversal by this court. That, on June 2, 1972, the court denied, and instead granted the Navy's motion for summary affirmance.[14] As we have stated, the instant litigation was commenced on February 4, 1975, and the appeal contests the District Court's ruling that appellant's claims were time-barred.[15]

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[8] Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 383, codified as amended, 5 U.S.C. § 552 (Supp. V 1975), further amended by Act of Sept. 13, 1976, Pub. L. No. 94-409, § 5, 90 Stat. 1247.

[9] Appellant was represented by counsel in that case.

[10] *Saffron* v. *Wirtz*, Civ. No. 3287 (D. R.I. Oct. 27, 1969) (unreported).

[11] App. I 6.

[12] *Saffron* v. *Hodgson*, Civ. No. 2352-71 (D.D.C.) (order of Feb. 10, 1972) (unreported). The dismissal was for failure to comply with Fed. R. Civ. P. 8.

[13] *Id.* (order of Feb. 29, 1972) (unreported).

[14] *Saffron* v. *Hodgson*, No. 72-1386 (D.C. Cir.) (order of June 2, 1972) (unreported).

[15] Appellant has been represented by counsel throughout the instant case.

II

Congress has not seen fit to enact a comprehensive array of time limitations on the enforcement of federally-created rights.[16] For relatively few, Congress has prescribed limitation periods, and when it has done so its mandate, of course, must be obeyed.[17] When, however, Congress has not spoken, the applicable limitation traditionally has depended upon the nature of the litigation,[18] a treatment inherited from the days when the common law and equity jurisprudence flourished as separate doctrinal systems. For actions at law, congressional silence was accepted as a reflection of federal policy to abide nonfederal statutes of limitation applicable in analogous situations;[19] when, however, the relief sought was purely equitable in character, the doctrine of laches—peculiarly

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[16] The right appellant asserts—freedom from unwarranted interference with his employment—depends completely on federal law for its existence and content. Consequently, we are unconcerned with nonfederal statutes of limitation save possibly as one or more may be absorbed in the interstices of federal enactments. See note 19 *infra* and accompanying text.

[17] "If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive." *Holmberg* v. *Armbrecht*, 327 U.S. 392, 395, 66 S.Ct. 582, 584, 90 L.Ed. 743, 746 (1946).

[18] *E.g.*, *id.* at 395-396, 66 S.Ct. at 584, 90 L.Ed. at 746-747; *N. V. Philips' Gloeilampenfabrieken* v. *Atomic Energy Comm'n*, 114 U.S.App.D.C. 400, 405, 316 F.2d 401, 406 (1963).

[19] *E.g.*, *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 462, 95 S.Ct. 1716, 1721, 44 L.Ed.2d 295, 302 (1975); *UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 701-705, 86 S.Ct. 1107, 1110-1113, 16 L.Ed.2d 192, 197-199 (1966); *Holmberg* v. *Armbrecht*, *supra* note 7, 327 U.S. at 395, 66 S.Ct. at 584, 90 L.Ed. at 746-747.

a creature of equity [20]—measured timeliness of the suit.[21] this distinction has survived four decades of merger of common law and equity procedure in the federal courts.[22]

Suits against the United States—at least some of them—however, comprise one of the special categories of litigation for which Congress has erected a time barrier. Section 2401(a) specifies that "[e]very civil action commenced against the United States shall be barred unless a complaint is filed within six years after the right of action first accrues." [23] This mandate is but an exertion of the undoubted congressional power to impose restrictions upon the institution of litigation authorized against the Federal Government.[24] The critical inquiry, then, relates to the extent to which Section 2401(a) impacts either or both of appellant's prayers for relief.

III

Dismissal, on the basis of Section 2401(a), of appellant's claim for a monetary judgment, we are satisfied, was eminently correct. On this branch of the case appellant sought damages, including salary and other financial

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[20] *E.g., Mount Vernon Savs. Bank* v. *Wardman*, 84 U.S. App.D.C. 343, 344, 173 F.2d 648, 649 (1949); *Hill* v. *Chambers*, 63 App.D.C. 36, 37-38, 68 F.2d 781, 782-783 (1934).

[21] *E.g., Holmberg* v. *Armbrecht*, *supra* note 17, 327 U.S. at 395-396, 66 S.Ct. at 584, 90 L.Ed. at 746-747; *N. V. Philips' Gloeilampenfabrieken* v. *Atomic Energy Comm'n*, *supra* note 18, 114 U.S.App.D.C. at 405, 316 F.2d at 406. But see Parts IV, V *infra*.

[22] See cases cited *supra* notes 17-21.

[23] 28 U.S.C. § 2401(a) (1970). The section further provides that "[t]he action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases."

[24] See *Szyka* v. *United States Secretary of Defense*, 525 F.2d 62, 65 (2d Cir. 1975).

benefits lost by reason of the termination of his employment. Relief of that character would have been possible only by resort to the federal fisc, and the effort in court to obtain it, nominally against named federal officials, was in every sense a "civil action commenced against the United States." [25] By the terms of the statute, the six-year limitation period began to run from the time the "right of action first accrue[d]" [26]—certainly no later than final administrative disposition of appellant's claim on April 26, 1966 [27]—and the record does not support an argument that compliance with Section 2401(a) was frustrated by obstructionism on the part of the Navy.[28]

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[25] *Dugan* v. *Rank*, 372 U.S. 609, 620-623, 83 S.Ct. 999, 1006-1008, 10 L.Ed.2d 15, 24-25 (1963); *Ogletree* v. *McNamara*, 449 F.2d 93, 99-100 (6th Cir. 1971); *Allen* v. *Allen*, 291 F. Supp. 312, 314 (S.D. Iowa 1968).

[26] See text *supra* at note 23.

[27] See, *e.g., Crown Coat Front Co.* v. *United States*, 386 U.S. 503, 510-511, 87 S.Ct. 1177, 1181-1182, 18 L.Ed.2d 256, 263 (1967); *N. V. Philips' Gloeilampenfabrieken* v. *Atomic Energy Comm'n*, *supra* note 18, 114 U.S.App.D.C. at 405, 316 F.2d at 406.

[28] Compare *Hartford Life Ins. Co.* v. *Title Guar. Co.*, 172 U.S.App.D.C. 156, 160, 520 F.2d 1170, 1174 (1975); *Emmett* v. *Eastern Dispensary & Cas. Hosp.*, 130 U.S.App.D.C. 50, 55-57, 396 F.2d 931, 936-938 (1967); *Westinghouse Elec. Corp.* v. *City of Burlington*, 122 U.S.App.D.C. 65, 67-68, 351 F.2d 762, 764-765 (1965).

Although appellant was in and out of the courts before initiating the present case, we need not decide whether any of his prior suits tolled the limitation period because, by our computations, the six-year period expired in any event prior to institution of the action now under review. Administrative remedies were exhausted on April 26, 1966, and the present litigation commenced on February 4, 1975—eight years, nine months and eight days later. Appellant's suit under the Freedom of Information Act got under way on November 27, 1967, and ended on October 27, 1969, a period of one year, eleven months. His first *pro se* complaint was filed on October 16,

The filing of the complaint in the instant litigation on February 4, 1975, came too late for a money award.[29]

Appellant's endeavors to secure reinstatement to his job, however, generates somewhat more difficulty, which the parties' argumentative approach has accentuated. In this court, the briefs on both sides, while postulating monetary recovery as a matter implicating Section 2401 (a), have treated reinstatement solely as a problem of laches. Accordingly, the litigants, like the District Court, have focused exclusively on disputes over the reasonableness of the delay in instituting the case before us and resulting prejudice to the Navy. Despite the relevance of those considerations on an issue of laches had appellant's action been brought within the six-year period,[30] no one has satisfactorily explained why Section 2401(a) does not itself bar reinstatement as well as the monetary demand. Our own research—which is now to follow [31]—has demon-

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1971, and the proceeding initiated by his *pro se* mandamus complaint terminated June 2, 1972—a period of seven months, seventeen days, assuming that there was no time gap between them. The aggregate of the three previous suits, then, is two years, six months and seventeen days, which when subtracted from the eight years, nine months and eight days elapsing from exhaustion of remedies to inception of the instant case, leaves six years, two months and twenty-one days—more, of course, than the six-year limitation period.

[29] Compare *Kirby* v. *United States*, 201 Ct. Cl. 527 (1973), *cert. denied*, 417 U.S. 919, 94 S.Ct. 2626, 41 L.Ed.2d 224 (1974); *Middleman* v. *United States*, 91 Ct.Cl. 306, 307-308 (1941); *Perry* v. *United States*, 405 F.Supp. 1061, 1063 (E.D. Mo. 1975).

[30] *Patterson* v. *Hewitt*, 195 U.S. 309, 319, 25 S.Ct. 35, 37, 49 L.Ed. 214, 218 (1904); *Godden* v. *Kimmell*, 99 U.S. 201, 202, 25 L.Ed. 431 (1878); *Hayward* v. *Eliot Nat'l Bank*, 96 U.S. 611, 617-618, 24 L.Ed. 855, 857-858 (1877). But see *Washington Loan & Trust Co.* v. *Darling*, 21 App.D.C. 132, 140 (1903); *Royal Air Properties, Inc.* v. *Smith*, 312 F.2d 210, 214 (9th Cir. 1962)

[31] Parts IV-V *infra*.

strated that the parties' analysis is faulty; that appellant's reinstatement bid, notwithstanding its equitable nature, is intercepted by Section 2401(a), and consequently also is barred.

IV

Even prior to unification of district-court proceedings in one form of action,[32] it had become well settled that whenever the courts of law and equity possessed concurrent jurisdiction to enforce the claimant's right, statutes of limitation were to be as forcefully applied in equity as at law.[33] A sufficient—though perhaps not the sole—reason was that, in all such instances, the statute imposed its restraint on the claim in suit, and not merely on the court in which it was asserted.[34] For obviously greater reason, the concurrency rule continues in full vigor after the procedural wedding of law and equity.[35]

We have no doubt but that the rule, independently of any other consideration, governs the case at bar. The one right that appellant presses in this litigation is to freedom from legally unjustified molestation in the job he held as an employee of the Navy. On the premise that

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[32] This occurred in the federal system in 1938.

[33] *Russell* v. *Todd*, 309 U.S. 280, 289, 60 S.Ct. 527, 532, 84 L.Ed. 754, 761 (1940); *Baker* v. *Cummings*, 169 U.S. 189, 206, 18 S.Ct. 367, 373, 42 L.Ed. 711, 718-719 (1898); *Metropolitan Bank* v. *St. Louis Dispatch Co.*, 149 U.S. 436, 448, 13 S.Ct. 944, 948, 37 L.Ed. 799, 803 (1893); *Moran* v. *Schlosberg*, 67 App.D.C. 163, 165-166, 90 F.2d 408, 410-411 (1937); *Anglo-Columbian Dev. Co.* v. *Stapleton*, 57 App.D.C. 209, 211, 19 F.2d 683, 685 (1927).

[34] *Hurdle* v. *American Sec. & Trust Co.* 59 App.D.C. 58, 60, 32 F.2d 954, 956 (1929).

[35] *E.g.*, *Cope* v. *Anderson*, 331 U.S. 461, 463-464, 67 S.Ct. 1340, 1341, 91 L.Ed. 1602, 1607 (1947); *Filson* v. *Fountain*, 90 U.S.App.D.C. 273, 274, 197 F.2d 383, 384 (1952). See also cases cited *infra* notes 38, 40.

the right has been infringed by an unlawful discharge, appellant demands redress in the form of both restoration and damages. While the former undoubtedly partakes of an equitable hue, the latter undeniably is legal relief in an ancient role; and while these complementary remedies are capable of that sort of distinction, "[t]here is in fact but a single right and single default involved. . . ." [36]

This, we find, is the kind of parallelism that demonstrates applicability of the concurrency rule. As we read the Supreme Court's pronouncements on the subject, only when a court is importuned "to enforce rights cognizable only in equity [are] statute[s] barring legal causes of action . . . not controlling." [37] Put another way, "[t]he decisive feature . . . which gives jurisdiction the flavor of concurrency, is not the narrow question of whether formal relief requested in a particular action is equitable or legal, primary or incidental, but the broader determination of whether the federal right in issue may be judicially enforced in any action by means both legal and equitable." [38] Additionally to the binding effect of the Supreme Court's expositions of federal law, this view is thoroughly consistent with our own rather numerous holdings in the area [39] as well as those of other courts.[40]

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[36] *Hurdle* v. *American Sec. & Trust Co.*, *supra* note 34, 59 App.D.C. at 60, 32 F.2d at 956.

[37] *Russell* v. *Todd*, *supra* note 33, 309 U.S. at 291, 60 S.Ct. at 533, 84 L.Ed. at 762. See also *Holmberg* v. *Armbrecht*, *supra* note 17, 327 U.S. at 395, 66 S.Ct. at 584, 90 L.Ed. at 746.

[38] *Tobacco & Allied Stocks* v. *Transamerica Corp.*, 143 F. Supp. 323, 327 (D. Del. 1956), *aff'd*, 244 F.2d 902 (3d Cir. 1957).

[39] In addition to cases cited *supra* notes 33-35, see *Washington Loan & Trust Co.* v. *Darling*, *supra* note 30, 21 App.D.C. at 140; *Patten* v. *Warner*, 11 App.D.C. 149, 161-162 (1897); *Sis* v. *Boarman*, 11 App.D.C. 116, 121-122 (1897).

[40] *Swan* v. *Board of Higher Educ.*, 319 F.2d 56, 59-60 n.5 (2d Cir. 1963); *Baker* v. *F & F. Inv.*, 420 F.2d 1191, 1193

One decision we may note with particular profit.[41] In an action charging violation of federal civil rights legislation by the plaintiff's alleged improper suspension from a state educational institution,[42] the Second Circuit took pains to consider "whether, because his complaint seeks not damages but rather declaratory and injunctive relief, it should be considered solely 'equitable' and hence as governed not by a statute of limitations but rather by

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(7th Cir.), *cert. denied*, 400 U.S. 821, 91 S.Ct. 41, 27 L.Ed.2d 49 (1970); *Tobacco & Allied Stocks* v. *Transamerica Corp.*, *supra* note 38, 143 F.Supp. at 325-326; *Saylor* v. *Lindsley*, 302 F.Supp. 1174, 1182 (S.D. N.Y. 1969), *rev'd on other grounds*, 456 F.2d 896 (2d Cir. 1972).

We are advertent to decisions in the Third Circuit assessing concurrency, not on the basis of availability of a legal remedy for the asserted violation, but according to whether equitable relief is needed to make the plaintiff whole. If so, that court rules, an applicable statute of limitations bars the legal remedy but the propriety of equitable relief is a matter of laches. *Churma* v. *United States Steel Corp.*, 514 F.2d 589, 590 n.2 (3d Cir. 1975); *Gruca* v. *United States Steel Corp.*, 495 F.2d 1252, 1256 (3d Cir. 1974). In our view, however, the vital inquiry is not the type of relief demanded but the nature of the right at stake, and it is the availability rather than the adequacy of legal redress that harmonizes with the Supreme Court's interpretation of concurrency. See text *supra* at note 35. Moreover, since equitable relief may be granted only when the remedy at law is inadequate, the test of adequacy can hardly be expected to ever summon the applicability of the statute. See Note, *Laches in Federal Substantive Law: Relation to Statutes of Limitation*, 56 B. U. L. Rev. 970, 975 (1976). Then, too, the adequacy approach necessitates a close analysis of the pleadings to ascertain whether legal relief is calculated to suffice, a kind of formalism at odds with the Federal Rules of Civil Procedure. See *Tobacco & Allied Stocks* v. *Transamerica Corp.*, *supra* note 38, 143 F.Supp. at 326-327.

[41] *Swan* v. *Board of Higher Educ.*, *supra* note 40.

[42] Jurisdiction was invoked under 28 U.S.C. § 1343(3) (1970) and 42 U.S.C. § 1983 (1970). 319 F.2d at 57.

the doctrine of laches." [43] The court "concluded . . . that since plaintiff could also have sought Civil Rights Act relief by way of damages, he is not here asserting 'a federal right for which the sole remedy is in equity,' . . . and hence the situation is one of 'concurrent' legal and equitable jurisdiction, in which case the statute of limitations does apply." [44]

Surely the same result follows where, as here, legal as well as equitable relief is an object of the suit.[45] The all-important factor from our viewpoint is that despite the historical dissimilarity of the remedies pursued, the right they purportedly would vindicate is single and indivisible. Where that is so, and remediation does not lie exclusively within the domain of equity, the availability of legal relief to enforce the underlying right summons the statute of limitations into play as to the whole.

V

The case before us calls for an application of the concurrency doctrine even more peculiarly and strongly than the coexistence of legal and equitable remedies ordinarily would. Section 2401(a) is part of the Tucker Act—century-old legislation by which district courts share with the Court of Claims jurisdiction over suits against the United States.[46] Save only for a district-court ceiling in

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[43] 319 F.2d at 59 n.5 (citation omitted).

[44] *Id.* at 59-60 n.5, quoting *Holmberg* v. *Armbrecht*, *supra* note 17, 327 U.S. at 395, 66 S.Ct. at 584, 90 L.Ed. at 746 (citations omitted).

[45] See cases cited *supra* notes 32-35, 38-40.

[46] Act of Mar. 3, 1887, 24 Stat. 505, ch. 359, as amended, Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087, 1093 *et passim*. The provisions conferring jurisdiction on the district court are codified at 28 U.S.C. § 1346(a) (1970).

terms of amount involved,[47] jurisdiction is the same,[48] and the six-year limitation on district-court suits coincides exactly with the limitation statutorily imposed upon litigation instituted in the Court of Claims.[49] Equally importantly, the construction of the Tucker Act over the years has consistently been that district courts derive from it no greater power than the Court of Claims possesses under its own enabling legislation.[50] A factor prominently underpinning this interpretation, the Supreme Court has declared, is "the embarrassment which would attend the defense of suits brought against the Government if the jurisdiction of district courts were not deemed to be as restricted as that of the Court of Claims." [51]

Until recently, the Court of Claims had "specific jurisdiction only to award damages, [and] not specific re-

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[47] With exceptions not pertinent here, the Court of Claims has jurisdiction without regard to amount, 28 U.S.C. § 1491 (1970), while the federal district courts have jurisdiction "concurrent with the Court of Claims" over cases not exceeding $10,000. 28 U.S.C. § 1346(a)(2) (1970).

[48] *Lee* v. *Thornton*, 420 U.S. 139, 140, 95 S.Ct. 853, 854, 43 L.Ed.2d 85, 86-87 (1975); *United States* v. *Sherwood*, 312 U.S. 584, 591, 61 S.Ct. 767, 771-772, 85 L.Ed. 1058, 1063-1064 (1941); *United States* v. *Jones*, 131 U.S. 1, 19, 9 S.Ct. 669, 671-672, 33 L.Ed. 90, 92 (1888).

[49] 28 U.S.C. § 2501 (1970). The Tucker Act, *supra* note 46, which conferred jurisdiction on both the Court of Claims and the federal district (and then-circuit) courts, originally contained the six-year limitation on suits in the Court of Claims, but did not limit suits in district courts. This ambiguity was rectified by the adoption of what is now § 2401(a) in 1911.

[50] See cases cited *supra* note 48.

[51] *United States* v. *Sherwood*, *supra* note 48, 312 U.S. at 591, 61 S.Ct. at 772, 85 L.Ed. at 1064.

lief," [52] and district courts acting under the Tucker Act were similarly confined.[53] This restraint has endured notwithstanding that the district courts have historically entertained suits for restoration to federal employment, couched in terms of mandamus.[54] And in 1964 the Tucker

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[52] *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 537, 82 S.Ct. 1459, 1476, 8 L.Ed.2d 671, 691 (1962) (per Harlan, J.). See *United States* v. *King*, 395 U.S. 1, 2-3, 89 S.Ct. 1501, 1502, 23 L.Ed.2d 52, 54 (1968); *United States* v. *Jones*, *supra* note 48, 131 U.S. at 16-17, 9 S.Ct. at 670-671, 33 L.Ed. at 91.

[53] See *Lee* v. *Thornton*, *supra* note 48, 420 U.S. at 140, 95 S.Ct. at 853-854, 43 L.Ed.2d at 86-87; *Richardson* v. *Morris*, 409 U.S. 464, 465-466 93 S.Ct. 629, 631, 34 L.Ed.2d 647, 649-650 (1973). *Cf. United States* v. *Sherwood*, *supra* note 48, 312 U.S. at 591, 61 S.Ct. at 771, 85 L.Ed at 1063.

[54] See, *e.g.*, *Levine* v. *Farley*, 70 App.D.C. 381, 385, 107 F.2d 186, 190 (1939), *cert. denied*, 308 U.S. 622, 60 S.Ct. 377, 84 L.Ed. 519 (1940). *Cf. Hammond* v. *Hull*, 76 U.S.App. D.C. 301, 303, 131 F.2d 23, 25 (1942), *cert. denied* 318 U.S. 777, 63 S.Ct. 830, 87 L.Ed. 1145 (1943). See also Eisenberg, *The Influence of the Writ of Mandamus in Federal Personnel Litigation*, 45 Geo. L. J. 388, 396 (1957); Murphy, *Judicial Review of the Removal of Federal Employees*, 22 Fed. B. J. 25, 26-27 (1962). In *Borak* v. *Biddle*, 78 U.S.App.D.C. 374, 377, 141 F.2d 278, 281, *cert. denied*, 323 U.S. 738, 65 S.Ct. 42, 89 L.Ed. 591 (1944) (giving declaratory judgment that dismissal was wrongful, but reserving the writ in case of official recalcitrance). As time wore on, the origin of this court's jurisdiction to grant reinstatement was obscured even as the scope of review grew broader than that associated with mandamus. See, *e.g.*, *Pelicone* v. *Hodges*, 116 U.S.App.D.C. 32, 320 F.2d 754 (1963). See also Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 Harv. L. Rev. 308, 342-344 (1968).

Act of Oct. 5, 1962, Pub. L. No. 87-748, § 1(a) 76 Stat. 744, codified as 28 U.S.C. § 1361 (1970) bestowed mandamus jurisdiction on all federal district courts. Prior to that enactment, only the courts of the District of Columbia had mandamus jurisdiction. Compare *M'Intire* v. *Wood*, 11 U.S. (7 Cranch.) 504, 3 L.Ed. 420 (1813), with *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 9 L.Ed. 1181 (1838).

Act jurisdiction of district courts was broadened to comprehend actions for money judgments in federal employee actions.[55] Thus the district courts might hear, under these jurisdictional heads, suits seeking job-restoration, monetary awards, or both, while the Court of Claims was then restricted to money judgments.

In 1972, the Court of Claims' remedial authority was enlarged to include job-reinstatement [56] in order "[t]o provide an entire remedy and to complete the relief afforded by the [monetary] judgment." [57] Thus, at long last, the powers of district courts and the Court of Claims in the federal-employment area were ostensibly congruent. The fact is, however, the six-year limitation for litigation in that court blocks reinstatement whenever it would bar a judgment for money.[58] Unless, then, district-court reinstatement proceedings are similarly time-restricted, the symmetry between the two courts which Congress has endeavored to promote in employee cases is to that extent completely destroyed.

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[55] Act of Aug. 30, 1964, Pub. L. No. 88-519, 78 Stat. 699, repealed 28 U.S.C. § 1346(d)(2), which had deprived district courts of power to render such awards. See *Almour* v. *Pace*, 90 U.S.App.D.C. 63, 193 F.2d 699 (1951). This reform eliminated the "standard procedure of two suits, one in the district court, against the head of the offending department, for restoration of plaintiff to his job, and another in the Court of Claims for back salary." D. Schwartz & S. Jacoby, Government Litigation 221 (1963), citing *Borak* v. *United States*, 110 Ct. Cl. 236, 78 F.Supp. 123, *cert. denied*, 335 U.S. 821, 69 S.Ct. 43, 93 L.Ed. 375 (1948); *Borak* v. *Biddle*, *supra* note 54.

[56] Act of Aug. 29, 1972, Pub. L. No. 92-415, 86 Stat. 652, amending 28 U.S.C. § 1491 (1970).

[57] *Id.* See S. Rep. No. 1066, 92d Cong., 2d Sess. 2-3 (1972); H.R. Rep. No. 1023, 92d Cong., 2d Sess. 1-3 (1972).

[58] *Cf. Kirby* v. *United States*, *supra* note 29, 201 Ct. Cl. at 537-538. This interpretation seems correct. See authorities cited *supra* note 57.

To tolerate a job-restoration effort through mandamus sought after expiration of Section 2401(a)'s six-year period is itself to wage war with the established requirement that the remedy be invoked with dispatch.[59] Even more alarmingly, it would allow the claimant to pursue in a district court an objective he could not aspire to in the Court of Claims, and thereby upset the congruity for which Congress ever so recently has striven. In determining the propriety of an application of the concurrency rule, we are not at liberty to ignore congressional policy, or more egregiously to frustrate it.

We reject, then, the notion that Section 2101(a) does not extend to the equitable as well as common law features of appellant's claim. We hold that his suit is barred in its entirety.[60] It follows that the Navy's motion to dis-

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[59] See, *e.g.*, *United States ex rel. Arant* v. *Lane*, 249 U.S. 367, 372, 39 S.Ct. 293, 294, 63 L.Ed. 650, 652 (1919), where, in holding the petition for mandamus to restore to position untimely, the Court said:

> When a public official is unlawfully removed from public office, . . . obvious considerations of public policy make it of first importance that he should promptly take the action requisite to effectively assert his rights, to the end that if his contention be justified the Government service may be disturbed as little as possible and that two salaries shall not be paid for a single service.

Cf. Caswell v. *Morgenthau*, 69 App.D.C. 15, 17, 98 F.2d 296, 298, *cert. denied*, 305 U.S. 596, 59 S.Ct. 81, 83 L.Ed. 378 (1938).

[60] Although we do not reach the question, it is noteworthy that two other circuits have found § 2401(a) to bar equitable relief by its own terms. *Screven* v. *United States*, 207 F.2d 740, 741 (5th Cir. 1953); *Werner* v. *United States*, 188 F.2d 266, 268 (9th Cir. 1951).

miss was well taken,[61] and that the District Court's grant must be

Affirmed.

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[61] An action is dismissible when the complaint shows on its face that the statute of limitations interposes an insuperable barrier. *Jones* v. *Rogers Memorial Hosp.*, 142 U.S.App.D.C. 51, 53, 442 F.2d 773, 775 (1971); *Hanna* v. *United States Veterans Administration Hosp.*, 514 F.2d 1092, 1094-1095 (3d Cir. 1975); *White* v. *Padgett*, 475 F.2d 79, 85 (5th Cir.), *cert. denied*, 414 U.S. 861, 94 S.Ct. 78, 38 L.Ed.2d 112 (1973); *Ott* v. *Midland-Ross Corp.*, 523 F.2d 1367, 1369 (6th Cir. 1975).

McGOWAN, *Circuit Judge, concurring separately*: To affirm the dismissal by the District Court of the complaint in this case, it is enough for me to recognize, as has the Ninth Circuit, *Werner v. United States*, 188 F.2d 266, 268 (1951) (*and see Screven v. United States*, 207 F.2d 740, 741 (5th Cir. 1953)), that 28 U.S.C. § 2401(a) constitutes a time bar uniformly applicable to both equitable and legal claims. The purpose of Congress to interpose this statute of limitations against all claims, legal and equitable, seems clear to me from the fact that the statutory predecessor of § 2401(a) referred to "suits" against the United States. The shift to the phrase "civil action" was obviously intended to reflect the merger of law and equity which had been a central objective of the Federal Rules of Civil Procedure promulgated by the Supreme Court a decade earlier. When, in the wake of that significant simplification of legal doctrine, Congress in 1948 commanded that "[e]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues," there can be no mistaking its purpose to lay to rest the ancient distinctions.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDWARD SAFFRON,

Plaintiff,

v.

DEPARTMENT OF THE NAVY, et al.,

Defendants.

Civil Action No. 75-163

FILED
MAY 15 1975
JAMES F. DAVEY, Clerk

ORDER

Upon consideration of defendants' motion to dismiss, the affidavit incorporated therein, and plaintiff's complaint, and it appearing to the Court that this action in seeking damages is barred by the statute of limitations, 28 U.S.C. §2401(a), and insofar as this action seeks restoration to plaintiff's former position with the Federal Government it is barred by the doctrine of laches, it is by the Court this 15th day of May, 1975

ORDERED that defendants' motion to dismiss be, and the same hereby is, granted; and it is

FURTHER ORDERED that this action be, and the same hereby is, dismissed with prejudice.

GEORGE L. HART, JR.
Chief Judge
United States District Court